

No. PD-0039-19

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
8/16/2019
DEANA WILLIAMSON, CLERK

JOHN CHRISTOPHER FOSTER, Appellant

VS.

THE STATE OF TEXAS, Appellee

From the Third Court of Appeals,
Cause No. 03-17-00669-CR and
the 403rd District Court of Travis County, Texas,
the Honorable Judge Brenda Kennedy, presiding

APPELLANT'S BRIEF

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Oral Argument Requested

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The Court of Appeals properly held appellant admitted conduct described in the indictment, *i.e.*, “cutting” the complainant, and was entitled to a self-defense instruction when he testified this occurred in self-defense. The Court of Appeals properly rejected the State’s argument that the conduct required to be admitted for an instruction on self-defense was controlled by the specific offense and the evidence the State chose to present rather than statutory definitions and the allegations in the indictment.

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IDENTITY OF JUDGE, PARTIES AND COUNSEL

The following is a list of all parties to the trial court's final judgment and their counsel in the trial court:

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STATEMENT OF PROCEDURAL HISTORY

John Christopher Foster was indicted for Aggravated Assault with a Deadly Weapon in cause number D-1-DC-17-201020 in Travis County, Texas. The offense was alleged to have been committed on February 9, 2017. Appellant was convicted and sentenced to 17 years and 6 months. The Court of Appeals reversed the trial court finding appellant was improperly denied a jury instruction on self-defense. This Court granted the State's request for discretionary review.

STATEMENT OF FACTS

I. Overview.

This is an aggravated assault family violence case. The original indictment alleged appellant “intentionally, knowingly, and recklessly” caused “serious bodily injury” by five actions. (CR 5). These actions were (1) “grabbing Sarah Morris with his hand” (2) “squeezing Sarah Morris with his hand”, (3) “striking Sarah Morris with his hand”, (4) “pulling Sarah Morris’ hair, and (5) “cutting Sarrah [sic] Morris with a knife.” (CR 5). It also alleged that appellant “used or exhibited a deadly weapon. (CR 5). After the close of evidence the State abandoned, without explanation, all allegations except cutting with a knife and pulling her hair. (RR7 147). It also abandoned the allegation that appellant “exhibited a deadly weapon” at the suggestion on the trial judge. (RR7 147).

The facts are not as clear cut as suggested by the State’s summary. The complainant testified appellant struck her and cut her with a knife. Appellant testified she attacked him with a knife and her injuries occurred in self-defense. For reasons unexplained except to possibly control the applicability of self-defense, the State abandoned any allegation concerning striking her. During the trial the trial judge was apparently confused by the indictment and the State’s evidentiary presentation. The trial judge instructed appellant’s trial counsel that the only way he could qualify for

a self-defense charge was to admit that he “cut her hair” even though that was not alleged in the indictment. The trial court ultimately denied the request for a self-defense instruction.

II. Background before the Assault.

Both appellant and the complainant testified they had a dating relationship for two and half years. (RR7 9). On the evening before the alleged assault, appellant came to the complainant’s home. (RR7 14, 92). The two had been arguing over appellant’s relationship with another person referred to alternatively as “Nikki” and “Nicole.” (RR7 43, 93). This dispute apparently led to the complainant’s tryst with another man partially in the presence of appellant. (RR7 14).

The complainant testified that she and appellant engaged in dominant but consensual sex play. (RR7 13). During these encounters, appellant would choke her and pull her hair. (RR7 13 - 14). She recounted a 2015 incident where the neighbors called police but testified she “. . . chalked it off as that we were having rough sex.” (RR7 11).

An aspect of this sexual relationship was that the complainant would have sex with other men in appellant’s presence. (RR7 14, 46). The complainant testified she agreed to this practice although she said it was at appellant’s request. (RR7 13, 15,

53). The complainant testified they had located a man identified only as “Dan” from a Craigslist advertizement. (RR7 14, 46). The complainant said appellant contacted Dan while appellant testified it was the complainant who initiated the encounter. (RR7 14, 16, 57 - 58, 92). The complainant testified as she performed oral sex on Dan, she made a comment about how well endowed Dan was. (RR7 14, 60). She said appellant became upset and left the apartment. (RR7 16 - 17, 47, 59). She was concerned appellant might leave with her car so she pursued him and tackled him in the front yard. (RR7 59). After appellant left, the complainant testified she had sex with Dan. (RR7 17, 61).

III. Complainant’s Description of the Charged Assault.

The complaint testified the day after the incident with Dan and argument over Nicole, appellant came to her residence. (RR7 17). She told him she had sex with Dan and appellant was upset. (RR7 18). She said appellant stayed with her that day and the two had sex all that day. (RR7 18 - 19, 60). The complainant left the residence alone to buy a bottle of vodka for them. (RR7 19, 61). At some point, the complainant went to take a bath. (RR7 21). She testified that appellant brought some knives to the bathroom and told her how to kill herself. (RR7 21). Later, appellant could not locate his phone and the two argued. (RR7 22).

The complaint testified appellant yelled and called her names. (RR7 22, 62). He smashed her laptop computer. (RR7 22). She testified appellant hit her in the face and pushed her to the floor. (RR6 88; RR7 24 - 25). The complaint also described going to a neighbor's home to seek help and testified appellant grabbed her by the hair and drug her back into the house. (RR7 27). She said he began to cut her hair with a serrated knife. (RR6 85; RR7 27; SX 55). They struggled for the knife and she gained control of it. (RR7 28). She placed it to his throat. (RR7 29). He apparently regained the knife and then stopped the assault. (RR7 30). At this point, the complaint realized she had defecated in her clothes. (RR6 87; RR7 30, 67).

The complainant went to take a bath. (RR7 30). Appellant followed her with a knife. (RR7 30). Appellant appeared intoxicated and passed out on the floor. (RR7 32). Police arrived. (RR7 33).

IV. Complainant's Injuries.

The responding officers and a paramedic described bruising and blood on the complainant. (RR6 40, 44, 89). An officer testified the complainant had some hair missing from the right side of her head and appeared to have a portion of her scalp missing. (RR6 43 - 44). Another officer also described cuts to the complainant's fingers and face. (RR6 137). A piece of skin with hair attached was recovered at the

residence. (RR6 141; SX 53).

A paramedic described a 1/4 to 1/2 cut on the complainant's chin, (RR6 88 - 89), and a cut to the back of her head. (RR6 96). She also had cuts to her hands. (RR6 105). The paramedic testified that untreated wounds "could become infected" and if "left untreated, it could eventually kill the patient." (RR6 97). He also testified that the cut to her scalp could leave a "scar" and "disfigurement." (RR6 99). The State did not ask about the seriousness of the other cuts.¹

The treating nurse also observed the cuts to her hands and chin and that she had two black eyes. (RR6 122). She also observed the complainant had a 2 centimeter cut to the scalp on the right side of her head. (RR6 122 - 123, 125). When asked if the wound could "cause some type of permanent disfigurement" she testified "It's possible it could, yes. If not treated, it could become infected." (RR6 126). She further stated it could lead to "sepsis." (RR6 126). Again, the State did not ask about the seriousness of any of the other cuts beyond offering testimony the cut to her chin could not be sutured because it was "unclosable." (RR6 126).

¹ The reason appellant describes this in the record is that State argues on appeal that "The victim suffered other injuries as well (such as bruises, scratches, and a cut to her chin, 6RR 88-89), but there was no evidence that any of these injuries constituted "serious bodily injury." State's Brief p. 8. The State does not, however, acknowledge that the principle reason for "*no*" evidence is that the State itself — the party bearing the burden of proof — did not offer any evidence on the issue.

IV. Appellant Testified He Was Attacked by the Complainant.

Appellant testified that the incident occurred during an argument. (RR7 97). He testified the complainant becomes aggressive when she is intoxicated. (RR7 97). During the argument, appellant told the complainant he was leaving to stay at the home of a female friend named Nicole. (RR7 97).

Appellant recounted that the complainant then started blaming appellant and threatening to kill herself. (RR7 97). She took his phone to prevent him from leaving. (RR7 97). Appellant started packing up his things. (RR7 98). The two exchanged insults. (RR7 98). Appellant testified that the complainant took a knife and started to cut off her hair. (RR7 99).

Appellant started checking for complainant's "hiding spots" looking for his phone. (RR7 99). He then threatened to break her computer if she did not give him his phone. (RR7 100). He admitted breaking the computer over his knee. (RR7 101).

All these events, including appellant's assertion that the complainant cut her own hair, occurred before he said she attacked him. Because the State asserts the right to a defense should be judged on an arguably contradictory statement that appellant was unaware of any self-inflicted injury by the complainant, this isolated statement

should be viewed in context.² Instead of simply quoting the particular statement or a fragment of it as the State did, appellant will provide the court with the full testimony. This was as follows:

QUESTION BY DEFENSE COUNSEL MR. BERNARD. What does she do?

ANSWER BY APPELLANT. Well, she was threatening earlier that she was going to kill herself and she had had a knife here and there, and she grabbed the knife that was off the counter and she started to cut her hair off. And at that time I honestly didn't think that she was doing it. So I was still, you know, packing my things and I was looking for my phone. She has little hiding spots all around the house, so I was checking all these little hiding spots she was going to.

Q. When did you observe the hair being cut and laying on the floor?

A. She actually whenever I had -- whenever I had got my bag packed, which was already mostly packed, you know, so I just grabbed it and I went back into the living room, I had saw that she had hair in her hands.

Q. How did you respond or react?

A. Honestly, I laughed about it. I couldn't believe that she had done it, and I had no idea of the extent of the injury that she had committed to herself. So at that point I was --

Q. You didn't see the patch of scalp missing?

A. I did not. I did not. She was facing me and, you know, I honestly didn't think that she had even cut that much hair off, but I really wasn't paying attention. Again, I was getting out of the residence. So at the time, you know,

² The standard of review, argued below, expressly requires evaluating evidence raising a defensive issue without weighing whether it is contradicted by other evidence.

I was still -- I was still being a jerk to her. I remember telling her, you know, make yourself look even uglier, go on, go for it.

(RR7 99 - 100). Even if the standard of review permitted the court to weigh evidence, this testimony in context does not deny any and all conduct as argued by the State

Appellant then described the attack. He testified that kneeled down over the computer and the complainant cut him on the neck from behind. (RR7 102; DX 1). She began attacking him and cut him on his right side. (RR7 102; DX 2). He defended himself because he believed she was trying to kill him. (RR7 102).

They struggled for the knife and he attempted to control her body so she would not cut him again. (RR7 107). He explained the knife touched her several times including causing the wound to her chin. (RR7 107 - 108). Appellant was cut on his fingers. (RR7 108). He eventually obtained possession of the knife away and threw it away. (RR7 108).

Again, because the State quotes only isolated portions of appellant's testimony, and paradoxically argues that the Court of Appeals did not examine the totality of appellant's testimony concerning self-defense, appellant will quote the actual testimony. Appellant testified as follows:

QUESTION BY DEFENSE COUNSEL MR BERNARD. When you kneeled down to grab the computer.

ANSWER BY APPELLANT. I felt something cut me in the right side of my

neck from behind. I felt a hand touch my forehead and I was cut on the right side of my neck.

Q. What do you do next?

A. I put my hand over my neck, which it was cut again, and I turned around as fast as I could. At that time I had got cut again on my right side. Sarah was attacking me with a knife at this time.

(RR7 102).

Q. Where were you cut?

A. I was cut on my neck and on my hand.

Q. Do you try to defend yourself?

A. At that time I really honestly believed that she was trying to kill me and I made the conscious decision to defend myself at that time. I raised my hand up and she cut me again under my arm.

(RR7 102 - 103). At that point, defendant's exhibit 16, a photo of a scar left on appellant by the cut was admitted.

Direct examination of appellant continued as follows:

Q. What is it that the pictures show?

A. It shows a small cut on the chin. Both of them show that same cut on the chin that was earlier talked about in the court.

Q. How did she sustain this injury?

A. When she was holding the knife close to her, the knife had touched her many a times. You know, she was holding it really close to her chin and really

(RR7 108) close to her body.

Q. As you're struggling with her over the knife, do you recall where you placed your hands or how many times you hit her?

A. I honestly don't recall. Now, I do remember that I took both my hands and I -- and once I was on top of her on the ground, I just tried to claw at her hands to break the knife away from her hands.

Q. And did you put your hands around her neck?

A. At one time in the struggle -- you know, I believe that a lot of the marks were caused by the shirt being pulled around her neck, but I did grab her by the neck and I did try to hold her down by the neck with my hand.

Q. At some point did you get control of the knife?

A. I did get control of the knife.

Q. How did you get control of the knife?

A. I pried her hands loose of it and I -- I was cut on my finger. The tip of my finger was cut off as well. But I actually did gain control of the knife and I threw it on the ground.

Q. After you gained control of the knife, what did you do? Once you threw it, what did you do next?

A. So I was extremely upset about this time and I (RR7 109) screamed at her really loud why she had done it and I held her there for a second. She stopped fighting and stopped struggling and I let her up.

(RR7 107 - 109). It should be noted, as argued in the body of brief, the State concedes appellant admitted cutting the complainant as alleged in the indictment. The real

problem in this case arose from an odd twist in this trial when the State apparently became focused on who cut the complainant's hair.

The State elicited the following on cross-examination:

QUESTION BY STATE'S COUNSEL MS. HERNANDEZ. Now, what I want to clarify is that it's your testimony that you did not cut off her hair?

ANSWER BY APPELLANT. Now, whenever we was struggling --

Q. Yes or no?

A. When we were struggling for the knife --

Q. Yes or no? Mr. Foster.

A. I did not scalp her.

Q. So you are admitting now that you did cut her hair?

A. Whenever we were struggling for the knife, her hair could have gotten cut. She was holding it close to her.

Q. You're saying that you did not cut her hair?

A. I am hair saying that I did not cut her hair.

Q. Okay. That you did not cut her hair.

(RR7 128 - 129). Despite appellant's description of an intense struggle in response to a knife attack by the compliant, the State asserts this testimony about cutting her hair somehow shows appellant claimed that any injuries caused were an accident. Although not in the indictment, the State's cross-examination concerning whether he

cut her hair led to confusion on the part of the trial court.

V. Confusion of the Trial Judge.

The trial judge was well aware that appellant would assert self-defense from voir dire and opening statements. (RR5 82 - 84, 86, 120 - 126, 157 - 166; RR6 24 - 26). The judge appears, however, to have been confused about the indictment and the way the State attempted to prove its case. After appellant's testimony the trial court said to trial counsel: "You know he messed up your self-defense because you have to admit to the conduct." (RR7 134). Trial counsel explained Appellant admitted hitting her. (RR7 134). The trial court responded as follows:

He is not charged with hitting her. He is charged with stabbing her with a knife and cutting her hair off. That's what the indictment reads. But anyway, just keep that in mind. He has to admit to the conduct in order to get the self-defense charge. You have to admit to the allegation.

(RR7 135).³

Despite the fact that the indictment actually *did* allege injury by "striking" her with his hand and *did not* allege "stabbing" or "cutting her hair off," (CR 5), trial counsel proceeded to meet the trial judge's stated requirement. Appellant was recalled and testified as follows:

³ This was prior to the State's abandonment of the "striking" and "squeezing" allegations. (RR7 147).

QUESTION BY DEFENSE COUNSEL MR. BERNARD. Mr. Foster, was that your voice that we just heard on the recordings?

ANSWER BY APPELLANT. Yes, sir. Yes, sir, it was.

Q. Did you cut Sarah's hair?

A. Like I said earlier, some of her hair was cut in the struggle, so, yes, some of her hair was cut.

Q. Did you cut her hair with a knife?

A. Technically --

Q. Just yes or no.

A. Yes, it happened.

(RR7 144).⁴ At no point did either the trial court suggest, or State's counsel argue, that the only injury that could constitute an offense under the indictment was the cut to complainant's scalp. This argument surfaced for the very first time in the State's brief on direct appeal.

VI. Denial of Instruction on Self-Defense.

Appellant timely requested a jury instruction on self-defense. (RR7 145). The

⁴ The State suggests this additional testimony was offered solely in response to a recorded phone conversation during cross-examination of appellant. State's Brief p. 11. It fails to mention the trial judge's specific instructional comments directing quoted here that trial counsel should present testimony on a this specific issue.

trial court denied the instruction. (RR7 151). Again, the State did not argue, as it does on appeal, that appellant would only be entitled to the instruction if he admitted to causing the specific wound it proved was serious bodily injury. Instead the State opposed the instruction because the “. . . defendant has not admitted to any conduct or force that he used to protect himself. In fact, his suggestion is that this was an accident and that is not appropriate for this charge.” (RR7 150).

The trial court’s confusion over the indictment and evidence concerning hair cutting continued during the charge conference even when defense counsel attempted to point out the State could have alleged this but did not. (RR7 145 - 146). In any event, the trial court denied the request for defensive instruction. (RR7 151). Appellant appealed that ruling and the Court of Appeals in a careful, well supported, opinion agreed. This Court should affirm that decision.

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

JOHN CHRISTOPHER FOSTER, Appellant

VS.

THE STATE OF TEXAS, Appellee

APPELLANT’S BRIEF

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW John Christopher Foster, Appellant, through counsel, Ken Mahaffey, and respectfully submits this Brief.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

1. Appellant was entitled to a jury instruction on self-defense based on the long accepted standard of review.

This should be a straight forward denial of a defensive instruction case. The indictment described assault causing injury by “cutting” and “pulling hair.” (CR 5). The offense level was raised to aggravated assault because the alleged “serious bodily injury” and use or exhibition of a deadly weapon. The State’s own evidence showed the complainant suffered numerous cuts. Appellant testified the complainant attacked him with a knife and that he cut her with that knife as he struggled to defend himself.

The trial court denied a self-defense instruction. The Court of Appeals correctly held appellant was entitled to an instruction on self-defense.

The State presents a novel argument. It acknowledges that appellant would have been entitled to a self-defense charge if charged only with bodily injury assault. However, it argues any entitlement to a defensive instruction in this case should be determined by two actions wholly within its own discretion. First, it elected to charge assault causing “serious bodily injury” rather than “bodily injury.” Second, it chose to present evidence that only a particular injury, not specified in the indictment, constituted serious bodily injury. The State now argues these choices control the exact conduct a defendant must admit for self-defense to be submitted to the jury.

Without stating it explicitly, the State is suggesting a new standard of review. Under this standard, the evidence necessary to raise a defensive issue should be controlled by the State’s charging elections and the evidence it presents. The Court of Appeals rejected this argument. The Court correctly looked to the indictment and statute defining the offense to determine the nature of the conduct appellant needed to admit to entitle him to a defensive instruction.

Additionally, the Court of Appeals properly rejected the State’s argument relying on isolated references to appellant’s testimony. The State attempted to show appellant was denying any conduct despite the fact that the State concedes appellant

admitted cutting the complainant as alleged in the indictment.

The Court of Appeals properly rejected this argument both because the context of his testimony does not support the State's isolated reference and the standard of review requires viewing evidence in the light most favorable to the submission of defensive issues rather than the State's theory of prosecution. Like the Court of Appeals, this Court should apply the standard of review that only some evidence is necessary to raise a fact issue and refrain from weighing evidence as now advocated by the State.

2. The Court of Appeals properly focused on the potential for harm rather than speculate whether or not the jury would have rejected the defense.

The State basically argues the concept of "overwhelming evidence" should govern error from denial of a jury instructions on defensive fact issues. Whether a jury rather than the trial court should decide a fact issue presents a different inquiry than other types of error. The Court of Appeals properly recognized this and followed this Court's decisions in its opinion. The Court of Appeals correctly held that removing fact issues from the jury has rarely been held harmless. Although not detailed in the State's argument before this Court, the Court of Appeals properly referenced many portions of the record to make its decision. The standard of review is "some" harm and appellant more than demonstrated it.

REPLY TO STATE'S GROUNDS FOR REVIEW

Reply Point One:

The Court of Appeals properly held appellant admitted conduct described in the indictment, *i.e.*, “cutting” the complainant, and was entitled to a self-defense instruction when he testified this occurred in self-defense. The Court of Appeals properly rejected the State’s argument that the conduct required to be admitted for an instruction on self-defense was controlled by the specific evidence the State chose to present rather than statutory definitions and the allegations in the indictment.

ARGUMENT AND AUTHORITIES

I. Introduction.

Appellant timely requested and was denied a jury instruction on self-defense. The indictment alleged appellant causes serious bodily injury by “pulling Sarah Morris’ hair” and “cutting Sarrah [sic] Morris with a knife.” (CR 5). Appellant testified the complainant attacked him with a knife and they struggled resulting in injuries to her by cutting her with the knife in self-defense. The Court of Appeals noted that a pre-requisite to asserting self-defense requires admitting some conduct that could be justified. The Court of Appeals then properly found the admitted conduct of cutting the complainant during a struggle described by appellant’s testimony fell well within the charging language of the indictment.

The Court of Appeals also properly refused to weigh evidence that may possibly have contradicted the defense. It correctly noted the question is whether a

fact issue is raised not whether that evidence is considered persuasive by the reviewing court.

The State sought review of this decision based on a creative argument that the right to any defensive instruction in an aggravated assault case requires defendants to admit to a particular injury the State chose to prove, and the seriousness of that injury, even though no specific injury was alleged in the indictment. The State cites no supporting authority for this position. The State's argument also is contrary to the long accepted standard of review that only some evidence is necessary to raise a defensive fact issue.

Appellant's response is the State's arguments is based on three modes of analysis.

(1) This Court should be mindful of the constitutional implications concerning rights to defensive instructions underpinning the long accepted deferential standard of review, specifically the legislative power to define defenses, the fact finding power vested in the jury, and allocation of the burden of proof to the State.

(2) The State concedes that appellant admitted to conduct constituting the lesser included offense of assault and a justification of his conduct. It cites no authority or explains why its charging and evidentiary elections make self-defense to inapplicable to the greater offense or should hinge on an a specific injury not

identified in its indictment.

(3) The State's argument presents a new standard of review suggesting reviewing courts must view evidence raising a defensive issue in the light most favorable to the level of offense the State elected to charge and evidence it chooses to present.

II. Defenses Embody Three Central Aspects of Our Justice System.

The Court of Appeals correctly applied the deferential standard of review by identifying an admission of conduct actually described in the indictment. The State's suggested new standard of review conflicts with constitutional guarantees not often discussed by the courts. There are a number of reasons why the Court of Appeals rejected the State's argument in this case. Although the many opinions on defensive instructions do not detail the basis for the accepted standard of review, it is based on certain fundamental constitutional principles. It was not necessary for appellant to present these arguments to the Court of Appeals, not only because the Court agreed with appellant, but also because the standard of review has been in place for so long that the constitutional basis is rarely discussed.

The right to defensive instructions involves three interrelated constitutional principles. First, the authority to defined offenses and defenses is vested in the

legislature. Second, the right to a jury trial specifically grants the right to have the jury decide fact matters like defensive issues. Third, the State bears the burden of proof and should not be permitted to alter the right to a defensive fact issue by simply choosing not to offer evidence on matters like whether one or another injury was serious bodily injury or not.

a. Legislative Power to Define Defenses.

While at common law, offenses were originally defined by the courts, the power to specify both offenses and defenses eventually shifted to legislative bodies. Under our constitutional system the power to define criminal offense and their defense is now controlled by statute. *Ex Parte United States*, 242 U.S. 27, 27 (1916); *Willis v. State*, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990)(the power to create and define offenses . . . and defenses . . . rests within the sound discretion of the legislative branch”). This legislative power should not be altered by the executive or judicial branch. *Ex parte Lingenfelter*, 142 S.W. 555, 561 (Tex. Crim. App. 1911)(“The legislative branch of the government write and enact the laws and the courts are but to construe and enforce them.”).

This Court has considered whether the State, as executive, infringes on the legislative power by seeking to control rights to statutorily defenses. In case of *Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002), discussed more fully below, this

Court held the State cannot alter the legislative authority to determine define defenses by an executive choice of which offense to charge. *Id.* at 31 (legislature intended that self-defense applied to all criminal offenses).

b. Jury Decides Facts.

The reason juries should be decide defensive issues also arises from a core foundation of our justice system. *Short v. State*, 16 Cr. R. 44, 47 (1879)(construing Tex. Const. art. I, § 15 (1876) as assigning fact finding power to jury in criminal cases); *see also Abdnor v. State*, 871 S.W.2d 726, 317 (Tex. Crim. App. 1994)(“Texas has followed the common law in assigning a fact-finding purpose to the jury . . .,” *citing* commentary to Tex. Const. art. I, § 15 (Vernon 1984)). The legislature implemented this allocation of fact finding to juries in Art. 36.13, Tex. Code Crim. Proc. (2015), providing that the “. . . jury is exclusive judge of the facts, but is bound to receive the law from the court.” This preserves the right to have fact issues, like the justification defense asserted in this case, to be decided by a jury not the court. *See* Art. 36.13, *supra*, (trial court must provide “. . . a written charge distinctly setting forth the law applicable to the case. . .”). The courts have recognized that defensive fact issues are part of the law applicable to the case. *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013)(“ . . . the trial court must give a requested instruction on every defensive issue that is raised by the evidence.”).

c. Burden of Proof is on the State.

A third fundamental tenet of our justice system inherited from English common law was that to deprive a person of liberty, there must be a factual showing the person actually engaged in prohibited conduct. *In re Winship*, 397 U.S. 358, 361 (1970) (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”). This is important because the State’s argument here is based on its own evidentiary choice to or failure to prove a specific fact as the determining factor in whether a statutory defense is applicable.

III. The Court of Appeals Properly Applied the Standard of Review.

The Court of Appeals properly decided this case. It applied the accepted standard of review. It reviewed the record for proof that a defensive issue was properly raised. It cited to the record showing appellant fully admitted cutting the complainant with a knife as alleged in the indictment. It determined whether that testimony showed a justification for otherwise criminal conduct noting that, if believed, appellant’s testimony showed he only engaged in conduct injuring the complainant as alleged in the indictment because he feared for his life. The Court of

Appeals’ analysis followed the long accepted standard of review concerning the right to defensive instructions.

The State now argues that, to raise self-defense, appellant had to admit to both particularized conduct, that is a causing a scalp injury not specified in the indictment. Even the State’s own evidence showed multiple cuttings as alleged in the indictment and the State admits evidence raises self-defense to lesser included offenses it elected not to include in its indictment.⁵

The Court of Appeals properly applied the law concerning the State’s charging and evidentiary choices. It cited to this Court’s decision in *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017). Slip Op. p. 10. It then quoted Court’s statement in *Gamino* that admitting conduct does “. . . not require [a defendant] to concede the State’s version of the events in order to be entitled to a self defense instruction,” Slip Op. p.12; *Gamino, supra*, at 512. The Court of Appeals then looked to case law applying this standard of review.

IV. The Court of Appeals Properly Applied Fact Specific Case Law.

⁵ See State’s Brief p. 18. (“Appellant might have been entitled to a self-defense instruction *on the lesser offense* if it had been included in the jury charge. But the only offense in the jury charge was aggravated assault causing serious bodily injury, and Appellant did not admit to that offense.”)(emphasis in original).

The Court of Appeals correctly relied on the oft cited case of *Holloman v. State*, 948 S.W.2d 349 (Tex. App. - Amarillo 1997, no pet.). *Holloman* held proof of conduct described by the indictment and statute defining the offense governed the right to a self-defense instruction rather than the evidence the State elects to present and prosecutorial theories of guilt. *Id.* at 352.

The issue in *Holloman* was whether defensive testimony that the alleged injury to the victim occurred in during a struggle between the defendant and his wife admitted sufficient conduct to raise the defense. *Id.* at 351. The defendant in that case testified his wife threatened him with a knife and he feared he would “get killed.” *Id.* The defendant also testified said the couple “tussled” and he fell on her. *Id.* The *Holloman* Court held that, although the defendant “. . . never expressly stated he had ‘hit’ his wife, . . . it could reasonably be said he conceded striking her.” *Id.* at 352. The Court rejected State’s argument that must admit “. . . the *particular* physical act alleged in the charging instrument. . .” because it would be “nonsensical” to prohibit self-defense claim for variance of method of type of force. *Id.* (emphasis in original).

More specifically, the *Holloman* Court stated:

In other words, if evidence is presented which discloses that the defendant used force in repelling the attack of another, as appellant presented here, there is no legitimate reason why he should be denied the defense simply because he refused to admit to using the type of force alleged by the State.

Id. at 352.

Without formally stating it, the *Holloman* Court balanced the legislative authority to define defenses in relation to the power to choose which offense to charge. The Court also noted the constitutional right to have juries decide issues of fact. By following the *Holloman* in this case, the Court of Appeals made the right decision.

Many other intermediate courts of appeal have cited and followed *Holloman*'s application of the "admitting-to-the-conduct" rule. These courts held the rule requires admission to the general nature of the conduct charged in the indictment not each specifically alleged act. *See e.g., Hubbard v. State*, 133 S.W.3d 797, 801 - 802 (Tex. App. - Texarkana 2004, pet. ref'd)(defendant testified victim's sternum broken in fall during struggle and court held "even if a defendant denies the specific allegations in the indictment" [striking with hand and foot], the defense was raised "as long as he or she sufficiently admits conduct underlying the offense"); *Torres v. State*, 7 S.W.3d 712, 715 (Tex. App. - Houston [14th Dist.] 1999, pet. ref'd)(admission of grabbing by hair and "possibly hitting her in the face" "sufficiently admitted his conduct to allow him to raise the issues of self-defense and apparent danger"); *Withers v. State*, 994 S.W.2d 742, 745 - 746 (Tex. App. - Corpus Christi 1999, pet. ref'd)(even though defendant's description of struggle while restraining child denied indictment allegations of "grabbing neck" and "pulling ears," she admitted sufficient conduct

for a self-defense charge). Because evidence raising a defense should not be evaluated for credibility or weighed against evidence contradicting it, the Court of Appeals properly held appellant's testimony concerning the struggle raised the defense. *Jordan v. State*, 782 S.W.2d 524, 527 (Tex. App. - Houston [14th Dist.] 1989, pet. ref'd)(“where the defendant testifies that he was acting in self-defense and other portions of his testimony indicate that there is no self-defense in the case, still it is a matter for the jury, and the court under such circumstances should submit the issue [to] the jury to pass upon,” *quoting Harris v. State*, 274 S.W. 568, 569 (1925)).

The Court of Appeals also cited its own decision in *VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex. App. - Austin 2005, no pet.). In that case, the Court also carefully considered the record showing appellant believed the victim threatened him with a gun and noting contradictions to that assertion. *Id.* at 710 - 712. Applying the standard of review the Court held “[w]hen the evidence is inconsistent and supports more than one defensive theory, the defendant is entitled to an instruction on every theory raised, even if the defenses themselves are inconsistent or contradictory.” *Id.* at 714. The State attempts to distinguish *VanBrackle* on the odd grounds that there were “. . . multiple witnesses testified that the defendant acted in self-defense.” State’s Brief p. 21. Again, the State is arguing that reviewing courts should weigh evidence (*i.e.*, by counting witnesses) and view it in the light most favorable to the

State's position rather than apply the long accepted standard of review.

The Court of Appeals decision below is also consistent with this Court's considerations of admission of conduct cases involving struggles. *See Alonzo v. State*, 353 S.W.3d 778, 781 (Tex. Crim. App. 2011)(struggling over a "spike" and admission that "next thing I know . . . he's got a hole in his chest" sufficient to raise right to defensive instruction); *Juarez v. State*, 308 S.W.3d 398, 201 (Tex. Crim. App. 2010)(testimony that defendant bit officer while resisting hold to ground he said prevented him from breathing sufficiently admitted conduct). The Court of Appeals properly applied the deferential standard of review and should be affirmed.⁶

V. The Right to a Defense Does Not Depend on the State's Decision to Charge a Greater Offense.

The State all but concedes appellant would have been entitled to a self-defense instruction if only charged with assault rather than aggravated assault.⁷ It then argues

⁶ The State argues the Court of Appeals reliance on *Alonzo* is ". . . is misplaced because the State did not argue the confession-and-avoidance doctrine in that case. . ." State's Bf. p. 21. Whether that issue was argued or not is not supported by any reference. It is also contradicted by the *Alonzo* Court's unequivocal statement that "The appellant raised evidence that he killed Rocha while acting in self-defense, a Chapter 9 justification," *Id.* at 781.

⁷ *See* State's Brief p. 18. ("Appellant might have been entitled to a self-defense instruction *on the lesser offense* if it had been included in the jury charge. But the only offense in the jury charge was aggravated assault causing serious bodily injury, and Appellant did not admit to that offense.")(emphasis in original).

this charging decision governs whether a fact issue concerning self-defense is raised by the evidence. The State’s argument rests on the assumption that the State’s own evidence proving a particular injury not specified in the indictment should control the exact type of conduct that appellant had to admit to raise the defense. The Court of Appeals correctly concluded the State’s formulation is not the proper standard of review.

The State also concedes the evidence proved the complainant sustained cuts during a struggle over a knife.⁸ The indictment clearly alleges “cutting” with a knife as the prohibited conduct and refers to no specific cut or injury. (CR 5). However, the State argues that only one particular cut to the scalp met the definition of serious bodily injury.⁹ As observed by the Court of Appeals, the indictment alleged only cutting with a knife not a specific cut to the scalp. Even though the State concedes appellant admitted conduct actually stated in the indictment, it now asserts that any

⁸ See State’s Brief p. 8 (“The victim suffered other injuries as well such as bruises, scratches, and a cut to her chin”); p. 10 (“the knife cut her chin during this struggle”); p. 18 (“admission to causing other cuts”).

⁹ See State’s Brief p. 12. (“There was no evidence that these other cuts caused serious bodily injury, so this was not an admission to the charged offense, i.e., first degree felony aggravated assault causing serious bodily injury. At most, this was an admission to a separate, lesser-included, uncharged offense—e.g., second degree aggravated assault, without bodily injury. Because Appellant did not admit to the charged offense, he was not entitled to a self-defense instruction on that offense, and the court of appeals erred in holding otherwise.”).

right to self-defense charge must be viewed in terms of what injuries it chose to prove. Significantly, the State cites no authority for this novel argument.

Under the State's argument, evidence showing appellant caused bodily injury in self-defense would entitle appellant to an instruction if he was charged with assault but not aggravated assault. Moreover, if the State chose to prove the seriousness of only one of the many injuries shown by its evidence, a defendant would be likewise be denied the right to assert that defense unless he admitted that particular injury and himself offered proof concerning its seriousness. Basically, the State argues it can control the right to a self-defense charge based on its charging elections and evidentiary choices. As noted above, the applicability of defenses is a constitutionally vested in the legislature and factual determinations constitutionally vested in the jury.

This type of argument was expressly rejected by this Court in *Boget v. State*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002). In *Boget*, the defendant was charged with criminal mischief. *Id.* The trial court denied a self-defense instruction holding self-defense was only applicable to assaultive offenses. *Id.* at 25 - 26.

After reviewing the legislative history of the self-defense statute and the legislature's authority to define offenses and defenses, the *Boget* Court held "[a] rule that allows a charge on self-defense where a person kills another, but prohibits the defense when a person merely damages the others property is inconsistent with the

purpose of the statute.” *Id.* at 30. The Court then illustrated this by noting that the right to a self-defense instruction concerning the same conduct, such as shooting at a car to avoid being run over, could be determined solely by which offense the State chose to prosecute. *Id.* at 30 - 31.¹⁰ This is exactly what the State is attempting to do here.

As the *Boget* Court concluded, the legislature did not intend to make the right to a defensive instruction dependent on how the State chose to draft its charging instrument and what evidence it chooses to present. *Id.* This legislative intent is also consistent with the constitutional right to have the jury to decide fact issues. *Id.* The deferential standard of review concerning whether a defense is raised by the evidence implements both of these principles. Under these prevailing standards of review, the Court of Appeals got this one right.

VI. Statutory Defenses Do Apply to Lesser Included Offenses.

The State incorrectly asserts that self-defense to a lesser included offense is not

¹⁰ This was also the position of the Court of Appeals being reviewed. *See Boget v. State*, 40 S.W.3d 624, 627 (Tex. App. - San Antonio 2001) (*Boget v. State*, 40 S.W.3d 624 (Tex. App. - San Antonio 2001) (“The right to protect oneself, others and property does not depend on the State’s decision to charge on particular offense or another.”)).

applicable in this case. State’s Brief p. 18 (*See* State’s Brief p. 12 (“ . . . an admission to a separate, lesser-included, uncharged offense—e.g., second degree aggravated assault, without bodily injury . . .” is insufficient “. . . because Appellant did not admit to the charged offense.”). Again, the State cites no authority for this proposition.

The courts have been quite clear that defensive issues do apply to lesser included offenses. *See Mendez v. State*, 545 S.W.3d 548, 556 (Tex. Crim. App. 2018)(error not to apply self-defense to both charged murder and lesser included offense of aggravated assault); *Burd v. State*, 404 S.W.3d 64, 71 (Tex. App. - Houston [1st Dist.] 2013, no pet.)(“Because the charge did not apply self-defense to the lesser included offense of deadly conduct and did not otherwise inform the jury that self-defense applied to both offenses in the charge, we hold there was error in the charge.”); *Jordan v. State*, 782 S.W.2d 524, 526 (Tex. App. - Houston [14th Dist.] 1989, pet. ref’d)(improper to not apply self-defense instruction to lesser included offenses); *see also c.f. Alonzo v. State*, 353 S.W.3d 778, 783 (Tex. Crim. App. 2011) (“The Court of Appeals erred by holding that a defendant can be convicted for a lesser-included offense when a fact-finder has acquitted the defendant for the greater offense based on a justification defense”).

This Court has also expressly noted that the an appellant is not required to

request a lesser included offense charge to entitle him to a self-defense instruction concerning a lesser included offense. In *Mendez, supra*, the Court rejected the State's argument that the failure to request application of self-defense to a lesser included offense was somehow strategic. *Id.* at 556. The Court then stated "[i]f the jury credited Mendez's claim of self-defense as to the offense of murder, it necessarily would have also found in his favor with respect to aggravated assault. . ." *Id.* In other words, the reason the State cites no authority is that its position is not supported by any current law.

Appellant submits this Court's analysis could stop right here. The State elected to charge appellant with aggravated assault. Evidence raising the right to a self-defense charge to a lesser included offense, *i.e.* assault, also applies to the greater offense. Even the State acknowledges appellant's testimony shows he caused bodily injury and raises a justification. To hold this admission of conduct would entitle an accused to a self-defense charge to assault but not aggravated assault would permit the State to usurp the legislative authority to define defenses. The State is not permitted to determine the applicability of statutory defenses by its charging decisions. *Boget v. State*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002). Moreover, defenses are fact issues committed to the jury. The Court of Appeals correctly applied the standard of review and should be affirmed.

VII. The Admission of Conduct Necessary to Raise a Justification Defense Requires Showing Similar Not Exact Conduct.

The Court of Appeals properly applied the “confession and avoidance” doctrine concerning defensive issues following *Juarez v. State*, 308 S.W.3d 398, 401 (Tex. Crim. App. 2010). This is basically a relevance concept that originated in common law pleading practices where the parties would join issue by narrowing fact issues to be decided. *Id.* at 402. A special plea in addition to a general denial was required to impose a justification defense that essentially admitted the events occurred causing the harm but that the defendant should not be liable because his conduct was justified under the circumstances. *See generally* Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L. J. 575, 623 (1994)(“The defense avoids liability on grounds of excuse rather than on grounds that it ‘was lawful to shoot the plaintiff’ . . . therefore, it is a justification . . . not a denial because the plea does not deny that the accident occurred or that the defendant was instrumental in bringing about the harm.”).

In criminal law defenses, such as self-defense, justification is raised not by formal pleading but by evidence supporting a fact issue on that question. *Juarez*, *supra* 403 - 404. This means the evidence must show the accused in effect admits certain facts constituting conduct that could be criminalized but the evidence also

raises a possibility that the conduct was justified and should not be punished. *See* Lafave, 2 Substantive Criminal Law 3rd Ed § 9.1(a)(3) pp. 6 - 7 (2018)(otherwise criminal conduct justifiable under circumstances recognized as “socially acceptable” such as meeting threats “of physical harm to the defendant’s person.”). Because justification is a fact issue, the constitutional right to have the jury decide that issue is implemented by a standard of review that requires the justification evidence raise only a “possibility.” *Shaw v. State*, 243 S.W.3d 647, 662 (Tex. Crim. App. 2007), *cert. denied*, 553 U.S. 1059 (2008)(entitled to a self-defense instruction regardless of whether evidence supporting the defense is “. . . strong or weak, unimpeached or contradicted . . .” and should be submitted even if trial court is of the opinion that the testimony raising the defense is not credible).

This need to admit some conduct in the confession and avoidance doctrine is embodied in Section 2.03(c), Tex. Penal Code Ann. (2015). That provision requires that the jury need only be instructed when there is some evidence supporting the defense. Again, this is basically a relevance matter because if the evidence indicates an accused committed no offense at all, then there is no issue concerning the excusing justification embodied in defenses like self-defense. As a result, the evidence raising the defensive issue does require some admission of conduct normally proscribed by the statute defining the offense in order to make the possibility of a justification

relevant as a fact issue for the jury.

The current standard of review balances the right to have juries decide fact issues with the power of the legislature to define offenses and defenses. In this case, the Court of Appeals correctly reviewed the record and found a proper fact issue on self-defense. While the State clearly would like to the standard of review to consider relevance in the light most favorable to its theory of prosecution, the Court of Appeals properly held the evidence need only show an admission of conduct sufficiently similar to that actually alleged in the indictment. Even the State acknowledges appellant's testimony did this.

VIII. Defendants Need Not Mirror State's Theories to Assert a Defense.

The courts do not normally discuss the reason why defendants are not required to fully admit the State's theory of prosecution or the specifics of the State's evidence. Those reasons have constitutional bases and are so embedded in the standard of review that such discussion is normally unnecessary. The basis for the standard of review is that State has both the burden of proof and the discretion over charging language in the indictment it presents.

The Courts have long held that the admission of conduct does not extend to every element and specific factual allegation of the State. *Gamino v. State*, 537

S.W.3d 507, 512 (Tex. Crim. App. 2017)(“Admitting to the conduct does not necessarily mean admitting to every element of the offense.”). The *Gamino* court explained that admitting conduct does “not require [a defendant] to concede the State’s version of the events”. *Id.* (“For example, a defendant can ‘sufficiently admit to the commission of the offense’ of murder even when denying an intent to kill.” *Id.*, citing *Martinez v. State*, 775 S.W.2d 645, 647 (Tex. Crim. App. 1989)).

The State controls what allegations are made in indictments and the what evidence is offered to prove those allegations. The legislature has authority to define defenses. To balance those powers against a defendant’s right to have the jury decide fact issues, the courts look not to the discretionary evidence offered to prove the State’s allegations but rather the statutes defining both the offense and the applicable defense. As a result, defendants are not required to specifically adopt the State’s theory of prosecution in a given case but rather generally satisfy the relevance requirement by admitting conduct similar to the statute defining the offense. *Gamino*, *supra* at 512.

Here, the State argues that evidence should be reviewed in the light most favorable to its evidence rather than the statute defining the offense and the language in the indictment. Under the State’s formulation, its case hinges on whether on of several injuries it proved qualified as “serious bodily injury”, *i.e.*, the scalp injury.

The Court of Appeals correctly noted this scalp injury was not specifically described in the indictment. Slip Op. p. 12 (“we note that the indictment did not allege that Foster caused an injury to Morris’s scalp; rather, the indictment asserted alternative means in which Foster allegedly committed aggravated assault, including cutting Morris with a knife.”).

A look at the actual indictment shows why the Court of Appeals correctly decided this issue. After abandoning certain allegations of “squeezing” and “striking,” the charging language in the State’s indictment was as follows:

- (1) appellant caused serious bodily injury by “pulling Sarah Morris’ hair” and
- (2) the injury was caused by cutting Sarrah [sic] Morris with a knife.”

(CR 5; RR7 147). As the Court of Appeals correctly observed, neither of these allegations identifies which cut or specific injury to her hair was the serious bodily injury. Slip Op. p. 12.

Under the State’s indictment, the jury could convict if they found the complainant was cut with a knife. This indictment did not limit this to a specific injury. The State alleged only that “cutting” caused an injury and further alleged that injury qualified as serious bodily injury. (CR 5).

Like the choice of what offense to charge, the State also has wide discretion on what evidence to present. By framing its argument in terms of what it chose to

prove rather than the statute defining the offense and the actual indictment allegations, the State is asking to amend the standard of review so that evidence raising defensive issues must be judged by the State's own charging and evidentiary choices. The result would be that the State's presentation of evidence could control whether a justification defense could ever be considered by a jury. The State does not cite, and appellant could not find, any authority for that proposition.

The Court of Appeals correctly rejected this novel suggestion to alter the standard of review and looked to whether the evidence raised a defensive issue in terms of the conduct alleged in the indictment and prohibited by statute. The Court of Appeals noted the record showed appellant admitted inflicted suffered numerous cuts to the complainant. *See* Slip Op. p. 12 ("Morris sustained cuts from the knife, including cuts to her chin and to 'her hair.'"); *see also* (RR6 88 - 89, 122 - chin; 105, 122 hands). The Court observed appellant testified he inflicted these injuries when the two struggled over a knife with which the complainant attacked him. *See* Slip Op. p. 11 ("Foster testified that he believed that Morris was going to try and kill him and decided to try to take the knife from Morris by wrestling it away from her. Additionally, Foster admitted that as a result of that struggle, Morris sustained cuts to various parts of her body.") (RR7 107 - 108)(appellant testified complainant's cuts sustained during struggle for control over the knife with which she was attacking

him). The only way the Court of Appeals could be reversed is to fundamentally alter the standard of review to view the nature of the conduct to be admitted in raising a defensive issue in the light most favorable to the State's evidence rather than the statute defining the offense and the actual indictment language.

IX. The State Seeks to Invert of the Standard of Review.

a. Legal sufficiency to prove a state's theory of prosecution does not govern whether evidence supports a defensive issue.

Under the established deferential standard of review, any evidence supporting the defense raises a fact issue for the jury to decide. *Gamino, supra* at 510 (“trial court errs in denying a self defense instruction if there is *some* evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self defense.”)(emphasis added). The State's argument here inverts this standard because it seeks review in the light most favorable to the State's chosen theory focusing on the evidence it presents to prove a particular injury not specified in its indictment.

The State's argument is essentially a legal sufficiency review inapplicable to whether a fact issue is raised. Legal sufficiency shares some of the same characteristics in that the evidence must sufficient to support a finding but is very different standard which concerns proof beyond a reasonable doubt not whether any

evidence would support a finding. In *Shaw v. State*, 243 S.W.3d 647 (Tex. Crim. App. 2007), this Court construed the language in Sec. 2.03(c), Tex. Penal Code Ann. (2007), requiring that “[t]he issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.” *Id.* at 657. The Court held that this review does require the evidence make a “*prima facie* case for the defense.” *Id.*

The Court defined a *prima facie* case as “that ‘minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.’” *Id.*, quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), affirmed 490 U.S. 754 (1989). When applied to defensive issues, this is logically a deferential standard. The proper inquiry is whether there is any evidence supporting the defense not whether the evidence conclusively or even persuasively proves the defense. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017)(not dependent on credibility of the defense). Stated differently, the distinction between legal sufficiency is to determine if a fact *was* proved by viewing it in the light most favorable to the verdict whereas a *prima facie* finding only requires proof of a *possibility* of a fact issue in the light most favorable to the factual basis of a defense. *Gamino, supra* at 510.

This is the case even when the State argues for a specific interpretation of its

charging language. It is well settled that an indictment can charge conduct that constitutes more than one offense. *Ex parte Goodbread*, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998) (jeopardy did not bar second drug delivery prosecution even that incident could have prosecuted under the same charging language as prior conviction). The constitutional right to have juries decide fact issues is not dependent on whether the State elects to prove some particular event not mentioned in its indictment. The statute defining the offense governs the conduct that must be admitted not the State's evidence offered to prove that conduct.

b. Interpreting testimony is a discretionary standard.

The State argues that the Court of Appeals improperly “plucked” testimony contradicted by other evidence. State's Bf. pp. 11, 12, 15. This argument misunderstands the Court of Appeals analysis. The Court of Appeals properly applied the standard of review by not weighing evidence in a manner inconsistent with need for only a *prima facie* showing necessary to raise a fact issue.

A reviewing court should examine the record for “any” evidence that would support a finding by a rational jury on the defense is sufficient to require an instruction “. . . whether that evidence is strong or weak, unimpeached or contradicted . . .” *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). Essentially, the State is seeking to invert the standard of review requiring that any evidence that does

not support the defense should be considered in determining whether a fact issue was raised.

The State relies almost exclusively its interpretation of appellant's statement that "I did not scalp her." (RR7 128). Instead of deference to whether the whole of his testimony raises self-defense, the State argues that any reviewing court must accept its own interpretation of this statement. The State argues this statement must be interpreted as saying he did not cut her scalp rather than any more general meanings such as he did not cut her whole scalp off.

Even the most cursory reference to dictionary definitions shows the term "scalp" term has many meanings, some of which are quite extreme. One definition is as follows:

"scalp":

1. the skin on the top and back of the head usually covered with hair.
2. a part of this, cut or torn off from the head of an enemy by North American Indians and preserved as a trophy.
3. a trophy.

See Webster's New Universal Unabridged Dictionary, p. 1613 (1972); *see also* *The American Heritage Dictionary Office Edition* (1983) p. 610 ("The skin covering the top of the human head — v 1. to cut or tear the scalp from"). Basically, the State

argues its interpretation this statement must be accepted as a complete denial of committing any injurious conduct even though the record shows appellant admitted causing other cuts to the complainant. The State cites no authority that a reviewing court must accept the State's own chosen interpretive definition and the case law simply does not support this argument.

Judicial applications of the deferential standard show that any such interpretations of language are fact issues for the jury. *See Gamino*, 537 S.W.3d at 510 (because supporting evidence is in the light most favorable to the defendant, it was “. . . reasonable, then, for the jury *to infer* that the words, ‘or else I will have to use this gun to protect us,’ were *implied*.”)(emphasis added); *Villa v. State*, 417 S.W.3d 455 (Tex. Crim. App. 2013)(noting the jury could possibly make inferential conclusions take of defendant's testimony that he touched child's genitals while applying diaper ointment was an admission to “penetration” or “. . . [a]lternatively, a reasonable juror could find Appellant's statement that he had, in fact, “touched the genitals of this little girl” was also an admission of penetrating her sexual organ” to raise medical care defense); *Shaw v. State*, 243 S.W.3d 647, 657 - 658 (Tex. Crim. App. 2007)(“defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, *would support a rational inference* that that element is true.”)(emphasis added).

The State again mistakes the inquiry of whether evidence could legally prove a factual finding for the whether the evidence raises the possibility that a jury could find that fact to be true.

The only authority the State cites to support its assertion that the Court of Appeals improperly isolated or “plucked” certain testimony in its analysis is not on point and also contradicts their argument. The State cites *Ritcherson v. State*, 568 S.W.3d 667 (Tex. Crim. App. 2018), a lesser included offense rather than defensive instruction case.

Ritcherson was a murder case where the defendant argued testimony that her actions of stabbing might have occurred as a “reflex” such that it raised the lesser included offenses of manslaughter and negligent homicide. *Id.* at 677. The Court discussed isolating specific testimony but only in the context of the required mental state, eventually concluding both lesser included offenses required an intentional rather than reflexive act. *Id.*

The *Ritcherson* Court also expressly rejected a similar “legal sufficiency” argument put forth by the State here. In that regard this Court stated:

The court of appeals correctly identified the issue in this case— whether Appellant had the intent to murder or only caused Fatima’s death recklessly— but it appears to have applied legal-sufficiency law instead of lesser-included-offense law. In that respect the court of appeals erred. The issue is not whether a rational jury could have found Appellant

guilty of murder; it is whether a jury could have reasonably interpreted the record in such a way that it could find Appellant guilty of only manslaughter. way that it could find Appellant guilty of only manslaughter.

Id. at 676. Like the defendant in *Ritcherson*, the State misinterprets the standard of review by focusing on the a specific factual issue in terms of legal sufficiency rather than whether it could create a fact issue properly delegated to the jury to decide.¹¹

The reason why the State cannot identify authority for its position is that it is contradicted by the above cited cases from this Court and other courts on the matter. If the State's argument is accepted it would fundamentally invert standard of review so that the evidence raising a defense must be viewed in the light most favorable to the State's chosen theory. This Court should be mindful that the reason why this transposition of the standard has never been applied is that it would ignore the

¹¹ The other case cited by the State, *McRay v. State*, No. 05-05-00286-CR, 2006 WL 874118 (Tex. App. - Dallas Apr. 6, 2006, no pet.), is even is also inapplicable and seems to have been cited because it involved pulling of hair. First, the *McRay* Court held the issue "inadequately briefed" because appellant did not identify any evidence he acted out of fear. *Id.* at 3. Second, even if properly presented he would not entitled to an instruction because he only admitting "hitting the furniture, walls and couch in an effort to dislodge [Ross] from his back." *Id.* Third ". . . appellant did not admit pushing Ross against the wall and specifically denied pulling Ross's hair or striking her as alleged in the indictment." *Id.* Here, appellant admitted the conduct alleged in the indictment specifically that he cut the complainant during the struggle over the knife and testified this occurred because he was in fear of his life. *McRay* is simply not on point.

constitutional rights imbedded in the current standard of review to have jury decide facts, the State's burden of proof, and the legislature's authority to define offenses and defenses. This Court should reject the State's attempt to alter the standard of review and affirm the Court of Appeals.

X. Conclusion - The Court of Appeals Should be Affirmed.

The Court of Appeals properly applied the standard of review. Appellant did not deny committing any conduct that could be a criminal offense. He readily admitted causing injuries as alleged in the indictment. He justified his conduct by describing being attacked with a knife and struggling in self-defense. Reliance on the State's isolated comment that he did not "scalp" the complainant as a denial of any offense ignores the deferential standard of review and the constitutional right to permit the jury to decide issues of fact and make inferences from the evidence.

The State argues that its own choices of what specific injuries supported its theory of prosecution should govern any determination of the right to a self-defense charge. If this new standard of review is accepted, defendants can be deprived of the right to defensive instructions solely by the State's discretionary charging and evidentiary choices. Such a rule would violate both the constitutional right to have the jury decide fact issues and the legislative power to define defenses.

Although confession and avoidance defenses require some admission to the conduct to be justified, a defendant is not required to wholesale adopt the State's theories in asserting the defense. That is specifically applicable to this case because the State's chosen theory on appeal is that only a single cut to the scalp could be serious bodily injury. The Court of Appeals correctly held this argument is not supported by the State's own indictment and the statute defining the offense.

Moreover, the State inverts the standard of review by asserting legal sufficiency of its own proof governs whether a fact issue concerning a defense existed. The State concedes that appellant would be entitled to a self-defense charge if he had only been charged with assault, but would only be entitled to the instruction if he admitted to the State's chosen theory of prosecution, a theory not stated in its own indictment. The Court of Appeals should be affirmed.

REPLY POINT TWO:

The Court of Appeals properly applied the standard of review for harm from the denial of a jury instruction on self-defense despite the existence evidence that might disprove that defense. Defendants have a constitutional right to have juries decide fact issues and denial of that right is the proper focus of any harm review.

ARGUMENT AND AUTHORITIES

I. Overview.

The State faults the Court of Appeals harm analysis because it does not weigh the evidence in favor of the State's position. Even if this was the standard of review, the record does not support the State's assertion that appellant's whole defense was to deny the offense and never actually relied on self-defense. The Court of Appeals correctly noted that the centrality of self-defense was apparent from the beginning of the case up until the trial court denied the requested instructions. Any jury arguments after that point only reflected compliance with the trial court's ruling. When viewed under the proper standard of review, particularly in light of specific comments and instructions made by the trial court not mentioned in the State's argument, appellant has shown sufficient harm to warrant reversal. The Court of Appeals correctly applied the proper standard of review and should be affirmed.

II. Standard of Review for Harm from Denial of a Defensive Instruction.

When, as here, an appellant timely requested a self-defense instruction, the judgment should be reversed if there is “some harm.” *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (opinion on reh’g). Denial of a self-defense charge “. . . is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense.” *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013). While this principle creates a virtual presumption of harm, a full harmless error review is still required. *Id.* at 450. As the Court of Appeals correctly, noted complete harm review requires examining the whole record. *Id.* This includes examination of the entire jury charge, the state of the evidence, arguments of counsel, and other relevant information from the record as a whole. *Id.* citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh’g).

Denial of defensive charges are almost always held reversible error. As this Court observed in *Rogers v. State*, 550 S.W.3d 190 (Tex. Crim. App. 2018), “Failure to instruct on a confession-and-avoidance defense is rarely harmless ‘because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense.’” *Id.* at 192 (*quoting Cornet*, 417 S.W.3d at 451). This Court also noted that *Cornet*, *supra*, represented “one of the rare cases”

where denial of an instruction was harmless. *Id.* The error was harmless in *Cornet* only because he was charged with multiple offense that medical care defense applicable to one charge was inapplicable to others. *Id.* Specifically, touching genitals with the hands to treat diaper rash could not have affected conviction for oral-anal penetration in the same prosecution. *Id.* Here, appellant was charged with a single offense of cutting the complainant, raised self-defense to that cutting asserting he responded to an attack, and was denied the opportunity to have the jury pass on that fact issue. Self-defense clearly applied to all conduct specified in the indictment.

III. Nature of case: theory of self-defense apparent from the beginning.

The State argues self-defense was not appellant's defense. State's Brief p. 13 ("This was not a self-defense case. This was an "I didn't do it" defense."). This is based on isolated statements that appellant did not "scalp" the complainant discussed above. The totality of the record, however, shows he asserted self-defense from the beginning of the case up to the point the trial court denied his request for an instruction. As argued also above, even the State concedes he admitted to conduct that would qualify as the lesser included offense of assault in support of that defense.

The State's argument that this was not a self-defense case is also contradicted by the fact that the State itself addressed self-defense during voir dire. (RR5 82 - 84).

The State asserted if one approaches your door with a knife you have a duty to close the door and call police. (RR5 86). The prosecutor expanded this stating “So you have to be able to be in a situation where you cannot retreat, so there’s no way of preventing the deadly force against you because you have no ability to retreat.” (RR5 86). Appellant objected that this misstated the law. (RR5 87). Eventually, the trial court agreed with appellant and instructed the jury there was no duty to retreat to act in self-defense. (RR5 157).

When it was appellant’s turn at voir dire, he also addressed self-defense.(RR5 120 - 125). He further raised the matter in his opening statement. (RR6 24 - 26). This record shows not only was it his sole defense, the theory of self-defense was before the jury from the beginning of trial. *See Johnson v. State*, 271 S.W.3d 359, 368 (Tex. App. - Beaumont 2008, pet. ref’d)(finding harm by noting centrality of defensive theory apparent beginning with opening statement). The Court of Appeals properly evaluated the record and found ample support showing that appellant’s central defensive theory was self-defense. The State’s arguments that some testimony suggested a particular injury could possibly been self-inflicted by the victim does not negate the abundant record appellant asserted injuries charged in the indictment were inflicted by appellant in self-defense. All of these matters were fact issues for the jury to decide and denial of a self-defense instruction denied appellant that right.

IV. The Jury Instructions as a Whole Show Harm.

a. The trial judge expressly instructed jury the trial court would determine the credibility of self-defense evidence.

As properly observed by the Court of Appeals, the record shows the jury received more instructions from the trial court than those in the final charge. *See Slip Op.* pp. 15 - 16 (“Given the focus on self-defense and in light of the district court’s statement that an instruction would only be provided if the evidence warranted an instruction, we believe that this factor weighs in favor of a determination that Foster was harmed by the omission”). This occurred during voir dire, when the trial court on its own initiative gave specific instructions concerning whether the jury could consider self-defense.

Context of record claims is always important. During voir dire, appellant asked the venire whether they could consider self-defense where the complaint was a woman. (RR5 121 - 124). At that point, the trial court, on her own initiative, attempted to clarify the defense was available to both men and women. (RR5 125). The court then read to the jury the statutory definition of self-defense from Sec. 9.31 (a), Tex. Penal Code Ann. (2015). (RR5 125). The trial court extensively interacted with the panel over this issue to ensure they understood the defense applied to both sexes. (RR5 157 - 166).

The Court of Appeals properly considered these instructions to the jury in its harm analysis. After reading the self-defense definition, the trial court added “[i]f that defense were met, then you would receive it in the charge and that is the definition that you will receive.” (RR5 125). Later the trial court also told the jury “Self-defense is something that can come up if the evidence warrants it. So you would only receive a charge on it if the evidence warranted it.” (RR5 156). As a result, the jury was expressly told by the trial court that they would only be allowed to pass on the issue of self-defense if the trial court found any evidence existed to support the theory. No self-defense instruction appeared in the charge communicating the trial court’s ruling it was not applicable to the case. The Court of Appeals correctly noted this was a clear indication of some harm.

b. Charge permitted only conviction if the jury found appellant injured the victim regardless of any justification.

The jury charge ultimately given required the jury to convict if they found Appellant’s actions injured the complainant. (CR 86). As a result, the jury did not have an opportunity to consider any defense that such actions could be legally justified. It also never learned of the State’s burden to disprove the defense. *See* Sec. 2.03 (d), Tex. Penal Code Ann. (2015)(“If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue

requires that the defendant be acquitted.”); *see also Allen v. State*, 253 S.W.3d 260, 263 (Tex. Crim. App. 2008) (instruction deficient where it did not mention requirement that jury must acquit appellant if it had reasonable doubt concerning defensive theory).

There is ample recent case law finding harm from jury charges which lack of any mechanism to consider a defense or apply the mandatory reasonable doubt requirement. *See, e.g., Gamino v. State*, 480 S.W.3d 80, 92 (Tex. App. - Fort Worth 2015, *affirmed* 537 S.W.3d 507, 510 (Tex. Crim. App. 2017))(because it was the jury’s not the judge’s role to decide if defensive evidence was credible, denial of a self-defense charge was harmful); *Gonzales v. State*, 474 S.W.3d 345, 350 (Tex. App. - Houston [14th Dist.] 2015, pet. ref’d)(“ If the charge did not allow for a justification defense appellant could not reasonably argue to the jury that she did the stabbing and still expect to be acquitted.”); *Dugar v. State*, 464 S.W.3d 811, 822 (Tex. App. - Houston [14th Dist.] 2015, pet. ref’d)(“When the trial court denied an instruction on appellant’s sole defensive theory, the jury was given a charge that contained no vehicle with which it could acquit.”). The Court of Appeals properly considered this case law and applied the standard of review to the case. The focus of the harm review is on whether appellant was denied having the jury decide a fact question not on whether the State or any reviewing court believes the evidence supporting that fact

issue was persuasive. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017)(jury not the trial court should have passed on credibility of defendant's evidence of self-defense). Appellant suffered some harm.

V. State of The Evidence: proof of guilt rested on the complainant's testimony.

The State essentially argues that because it does not find appellant's testimony persuasive, then any error had to be harmless. This is not the standard of review. While evidence of guilt is often an in harm review, the ultimate issue in concerning denial of defensive instructions is whether appellant suffered some harm in not having the jury decide a properly raised fact issue.

The Courts have often considered strong evidence of guilt in harm review. However, the Courts have been careful to balance this against the actual issue of whether a particular action resulted in some harm. The leading case on this issue clearly states that even overwhelming evidence of guilt should not be the "sole criteria for evaluating harm." *Kotteakos v. United States*, 328 U.S. 750, 764 - 765 (1946); *see also Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002)(same). Here, Appellant admitted to conduct causing injuries. (RR7 102 - 121). Combined with these admissions there was clearly legally sufficient proof of guilt. However, this Court should consider the reason why this overwhelming evidence argument is

carefully balanced in harm review. Constitutional rights like the right to have juries decide fact issues are important and harm review should rightly focus on that right rather than simply deciding the defendant would have been convicted anyway.

This principle applies quite directly in this case. The only proof that his conduct constituted a crime came from the complainant alone. As this Court is well aware, evidence of injuries alone does not prove criminal conduct. The record shows proof of bodily injury from the complaint, police investigation and medical professionals. Proof of appellant's guilt — his criminal responsibility for those injuries — requires accepting the complainant's version of events.

The typical “overwhelming evidence” aspect of review is inapplicable to denials of defensive instructions. *See Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007), *cert. denied*, 553 U.S. 1059 (2008)(entitled to a self-defense instruction regardless of whether evidence supporting the defense is “. . . strong or weak, unimpeached or contradicted . . . ”). The Court of Appeals properly applied the standard of review by focusing on the error at issue. The complainant's credibility was challenged concerning her motives for the unorthodox sexual practices leading up to the altercation, (RR7 13 - 14, 46, 60 - 61), inconsistencies in her description of the events, (RR7 55 - 56), and showing her continued contact with Appellant after his arrest for the offense. (RR7 37, 40, 44, 68, 71), Moreover, the State apparently had

some serious concerns about the evidence it expected from the complainant as it abandoned some of its allegations before the case was submitted to the jury. (RR7 147). Given that objective evidence showed injuries to the complainant, lack of a self-defense charge harmed appellant by rendering these credibility problems largely meaningless concerning any of her conduct. The Court of Appeals should be affirmed.

VI. Arguments: State emphasized lack of self-defense.

The State asserts appellant abandoned self-defense in closing argument by quoting an isolated statement from the record. *See* State’s Brief p. 25 (“defense counsel argued that “the sole issue is who scalped [Sarah].”). Setting aside the fact that appellant was denied to opportunity to argue self-defense when his request for an instruction was denied, this fragmentary statement hardly shows he never intended to assert self-defense as a justification in this case. When read in context, this part of appellant’s closing referred to the State’s abandonment of certain indictment allegations to show weaknesses in its case. Such weaknesses were the only arguments left after appellant was denied the opportunity to argue self-defense.

The argument the State refers to was as in its entirety as follows:

They’re not asking you to convict of this because they don’t believe her. They have abandoned the language. Why would they abandon this? Why would they

abandon this type of abuse? Ask yourself that. I'm going to give you a reason. The only thing my client says he did not do was cut her hair. So what the law says is we can't claim self-defense for something that we claim we did not do. So there is no self-defense in your jury charge because you can't argue self-defense for something you can't do. But for everything else he took responsibility for, they abandoned. They let it go.

(RR7 175). When read in context this statement does not abandon self-defense but simply argued what ever issues were available when his right to have the jury consider the issue was denied.

Rejection of Appellant's version was also emphasized by the State in closing argument. Specifically, the prosecutor argued, "I don't believe anything that the defendant said when he got up there. His story is ludicrous. It doesn't make any sense." (RR7 172). Given the trial court's comments that no instruction on self-defense would be applicable if not raised by the evidence, this argument reasonably suggests the trial judge agreed with the State's conclusion.

Prosecutors also decried Appellant's "audacity" to deny the offense, (RR7 180, 183), and to suggest "I did this to her because she cut me." (RR7 180). His denial was only audacious if he was required to "... concede the State's version of the events." *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017), and not present a defense. Denial of a self-defense instruction reinforced the State's arguments for conviction.

In *Brazelton v. State*, 947 S.W.2d 644 (Tex. App. - Fort Worth 1997, no pet.), the court found harm in a similar situation where the defendant conceded the conduct causing injuries but asserted the conduct was justified as self-defense. The Court noted that “[t]he prosecutor stressed this point in closing argument stating, ‘Ms. Brazelton admits to everything.’” *Id.* at 650. Construing this argument concerning the lack of self-defense charge, the court found harm because “. . . the jury had no option to convict appellant.” *Id.* Likewise denial of the instruction harmed Appellant in this case.

VII. Other Record Aspects: effect on ability to argue issues.

Trial counsel acknowledged to the jury that he was prevented from arguing self-defense and had to fall back on more technical arguments and highlighting problems in the complainant’s testimony. (RR7 175 - 178). The State suggests this means appellant somehow waived error concerning arguing self-defense when he argued other issues after being denied the right to argue self-defense by the trial court’s ruling.

The Court of Appeals properly noted that a far different argument would have been proper if authorized by a charge requiring acquittal if there was a reasonable doubt on the defensive issue. *See Johnson v. State*, 271 S.W.3d 359, 369 (Tex. App.

- Beaumont 2008, pet. ref'd)(although self-defense argued by counsel, he was harmed because “. . . without a proper self-defense instruction included in the jury's charge, trial counsel was unable to further argue appellant's legal entitlement to an acquittal if the jury agreed with his theory”). If the jury had been properly charged on self-defense, Appellant could have argued the problems with her credibility in terms of the State's burden to disprove the defense beyond a reasonable doubt. *See* Sec. 2.03 (d), Tex. Penal Code Ann. (2015). The Court of Appeals correctly decided that under the charge given, Appellant's admission to causing the injuries required conviction in spite of any justification. The charge denied Appellant the right to effectively argue his sole-defense.

VIII. Conclusion - Court of Appeals Correctly Found Harm.

The Court of Appeals properly found that appellant was harmed because the charge eliminated his sole defense. Appellant presented evidence that, if believed, would support a finding that he believed force was immediately necessary for self-defense. Whether his stated belief was contradicted, impeached or incorrect, did not preclude the right to the defensive instruction. The jury also knew the lack of a self-defense charge meant the trial court did not believe the evidence was sufficient to submit one. Moreover, the jury never learned of the State's burden to disprove self-

defense beyond a reasonable doubt. The charge provided no vehicle for the jury consider this issue. This Court of Appeals should be affirmed.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that the judgment of Court of Appeals be affirmed.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Ken Mahaffey".

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CERTIFICATE OF SERVICE

The above signature certifies that on August 16, 2019, this document was sent by electronic service to the Travis County D.A.'s Office, the State Prosecuting Attorney, and by mail to John Christopher Foster, 02161486, 12071 FM 3522, Abilene, TX 79601. The above signature also certifies that this document contains 540 words in the Caption and Table of Contents, 109 words in the Identity of Judge, Parties and Counsel, 475 words in the Index of Authorities. It also contains 14401 words total in the Statement of Facts, Summary of Argument, and Argument and Authorities in the Brief on the Merits.